FILE COPY

Office-Supreme Court, U.S.
FILED
NOV 2 1959
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1959.

No. 477.

ROBERT W. KELLEY et al.,
Petitioners,

v.

BOARD OF EDUCATION OF THE CITY OF NASHVILLE, DAVIDSON COUNTY, TENNESSEE, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

EDWIN F. HUNT,
700 American Trust Building,
Nashville 3, Tennessee,
REBER BOULT,
700 American Trust Building,
Nashville 3, Tennessee,
Counsel for Respondents.

St. Louis Law Printing Co., Inc., 415 N. Eighth Street. CEntral 1-4477.

INDEX.

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statement	3
Summary of argument	8
Argument	9
I.	
There is no substantial or undetermined Federal question	9
II.	
There is no conflict of decisions	14
III.	
The transfer provisions of the plan are valid	16
IV.	
Community attitude to desegregation	20
V.	
Rights of individual plaintiffs	22
VI.	
Conclusion	23

Cases Cited.

Aaron v. Cooper, 243 F. (2d) 361 (8 Cir. 1957)	14
Board of Education of St. Mary's County v. Groves, 261 F. (2d) 527	23

Brown v. Board of Education, 349 U. S. 294 . . 2, 8, 9, 13, 18

Cooper v. Aaron, 358 U. S. 1 . . . . . 9, 11, 14, 22

Moore v. Board of Education of Harford County, 152 F. Supp. 114 14

Slade v. Board of Education of Harford County, 252 F. (2d) 291 (4 Cir. 1958), cert. denied 357 U. S. 906 . . . . . 14, 15

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1959.

No. 477.

ROBERT W. KELLEY et al.,
Petitioners,

v.

BOARD OF EDUCATION OF THE CITY OF NASHVILLE, DAVIDSON COUNTY, TENNESSEE, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

OPINIONS BELOW.

The opinions below are appropriately cited in the Petition.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED.

We do not agree that the question presented for review is appropriately stated in the Petition and we submit the following as the basic question to be decided:

Whether the Supreme Court should (1) overrule its holding in **Brown v. Board of Education**, 349 U. S. 294, that district courts with proximity to local conditions are the appropriate judicial agencies to fashion and effectuate equitable decrees in segregation suits, and (2) examine again the conflicting evidence and appraise the complex facts to determine whether the lower courts have fashioned an equitable decree giving appropriate relief in approving a plan for gradual (grade by grade) desegregation, with voluntary transfers available to students who are a minority in their school zones, **thereby disregarding the concurrent findings of the District Court and Court of Appeals?**

STATEMENT.

The Petition for Certiorari adequately states the proceedings in the courts below, but it does not contain a fair or accurate summary of the oral testimony in the District Court. Because separate and able opinions of the Court of Appeals and of the District Court contain such summaries, we shall not unduly lengthen this Reply Brief with a new summary, but we refer to those mentioned as fully and fairly summarizing the evidence. In two opinions which must be considered together (R. 241a), the District Court made adequate and accurate findings (R. 46a and 236a). The Court of Appeals, holding that the District Court's conclusions were not erroneous and should not be set aside (Appendix to Petition, 73) did not stop with such findings. Its unanimous opinion included an original and complete summary of all the evidence (Appendix to Petition, 46-65). Although the opinions of the Court of Appeals and of the District Court are entirely distinctive and individual, they contain findings which are substantially identical and constitute concurrent findings.

Such summary of the testimony as the Petition contains is also misleading in the following particulars:

1. The Petition, p. 9, refers to the entire testimony in the District Court and with respect to it states that "with the exceptions set forth hereafter this testimony was concerned largely with hostility or antipathy to desegregation." The **only** exceptions "set forth hereafter" are on p. 13 and refer to "homogeneous groupings", "teacher recruitment", and "difficulties (of) the new racial transfer plan". To show the inaccuracy of the assertion that all other testimony was concerned largely with hostility or antipathy to segregation, we quote from the opinion of the Court of Appeals the following excerpts not "set

forth hereafter" in the Petition and not concerned with hostility to desegregation:

(a) ". . . the Superintendent of Schools of the City of Nashville called together all of the principals of the 38 elementary schools, announcing to them the necessity of submitting a plan for desegregating the remaining eleven grades. He commenced by stating that he had great respect for their judgment; that they were close to the entire matter; that they were interested in the children; and that he would like to have their suggestions as to the best plan to be adopted.

The principals appointed a committee of themselves to draw up a questionnaire, which all principals were invited to answer, without disclosing their names. The questionnaires were, accordingly, answered by the principals, and thereafter submitted to the Superintendent of Schools. In these replies to the questionnaires, one principal advocated immediate desegregation of all grades in all schools. Thirty-seven principals advocated a gradual plan, or a year-by-year plan" (Appendix to Petition, p. 48).

This excerpt from the opinion is based on testimony in the Record, pp. 109a-112a.

(b) "He (Chairman of School Board) felt that the plan, starting with the first grade, and continuing each year up another grade, would be successful. The Negro and white children would already be a part of the class when it went into the higher grade. They would keep their achievement level as they went through their school years; they would have gone through the same educational experiences, from the first grade up to the twelfth grade, year by year. For these reasons, the Chairman felt that the year-by-year plan was the best that could be devised. He stated that consideration had been given to a plan

to desegregate first the twelfth grade, then the eleventh, and so down, but the Superintendent had expressed the opinion that such a plan was educationally unsound; and the Board felt that, because of the transfer provisions of the plan, there would be no desegregation whatever in those grades, and that such a plan would be trying to get around the court order, and we were not trying to do that. We were trying to abide by the court ruling, and not try to get around it. So we switched ends then and started to try to work out the best we could from an educational standpoint.'" (Appendix to Petition, p. 52.)

This excerpt from the opinion is based on testimony in the Record, pp. 133a-134a.

(c) "Miss Brent (school principal for nineteen years) further observed, in her testimony: 'To me, integration and desegregation are not the same thing, and we would like very much at the end of 11 years, or however many years it takes, to feel that the schools are truly integrated, that it's not just a question of their being desegregated. That feeling will have to come from the hearts of people. It cannot be forced, and it certainly cannot be thrust upon them in a hurry. In the second place, I feel that little children, for instance, these children in the first grade, now are absolutely accustomed to having the Negro and the white child right there together. They play together. They eat together. Everything goes along just the same. There's no difference whatsoever made. Well, if that group moves on next year to the second grade, they will still be accustomed to that. The children that are coming in in the first grade naturally expect their group to be desegregated. If you jump and begin to take children in

higher grades, you are going to double your trouble. I firmly believe that it is the only plan. . . . We firmly believe now that they have a foundation that will prepare them to go along into the second grade with the white children. They will the next year be able to progress. There will be no differences in their (shall we say) background. We feel that educationally it will be the best thing for the child, and, after all, that is what we are concerned with. We leave the outside trouble to the policemen.'" (Appendix to Petition, p. 54.)

This excerpt from the opinion is based on testimony in the Record, pp. 154a-155a.

(d) "He (Superintendent of Schools) referred to a difference in the achievement level of pupils in the same grade and stated that, on the basis of evidence—test results—the teachers know that, in the field of arithmetic, for example, in the eighth grade, the level of achievement of the white children is two and a half years above that of the Negro children, and that that constituted a teaching problem. He stated that the schools' psychological testing service in 1954-55 released its publication showing that fact, and other facts relating to it; that the difference in the achievement level of the Negro and white students varied in certain subjects, but showed in the sixth grade, a difference of about two years and some months, and a difference in the achievement level, in the fourth grade, of about one year." (Appendix to Petition, p. 57.)

This excerpt from the opinion is based on testimony in the Record, pp. 38b-39b.

2. The Petition, p. 14, after stating that petitioners offered four witnesses, then says that "these witnesses

testified that experience with desegregation in several localities demonstrated that delay increases rather than decreases community antagonism." To the extent that the quoted statement contains or permits the inference that all four of petitioners' witnesses so testified, it is misleading.

One of petitioners' witnesses, C. L. Ennix, the Negro member of the Nashville School Board, did not profess any information or opinion with respect to segregation in other localities. Far from testifying that delay increases antagonism, he advocated a gradual plan, but not a twelve-year plan (R. 222a). Another of petitioners' witnesses, Preston Valien, while condemning "indecision" suggested a gradual plan "over a short period of time" (R. 207a).

SUMMARY OF ARGUMENT.

In approving a plan for grade by grade desegregation with voluntary transfers available to a student who otherwise would be required to attend a school or a grade as one of a racial minority, the District Court and the Court of Appeals carefully applied the principles laid down by this Court in **Brown v. Board of Education**, 349 U. S. 294. The Petition, therefore, really asks this Court to lay down new and different principles to control the lower courts or to appraise the concurrent findings in the individual case to see if the lower courts have granted the most appropriate relief.

There is no conflict of decisions. Three different Courts of Appeals (Fourth, Sixth and Eighth Circuits) have approved plans for gradual desegregation and no Court of Appeals has reversed the judgment of a District Court approving a gradual plan.

The transfer provisions of the plan are valid. Every student has the right to attend the school of his zone but if he is one of a minority race in that school or in his grade of that school, he may voluntarily seek transfer to another school. Obtaining such transfer is a binding election for a single school year only. The transfer provisions primarily affect only those who invoke them.

Evidence of violence and hostility was not offered at the hearings on the merits of the plan for desegregation. The only significance of violence or hostility in this case is the fact that when it occurred the School Board showed its determination and good faith in carrying out its primary responsibility.

The criticism that under a grade by grade plan of desegregation those attending the public school when the plan begins will never fully enjoy its benefits in greater or lesser degree may be made as to any gradual plan. As to the individual (infant) plaintiffs, they did not request of the District Court preferential treatment for themselves.

ARGUMENT.

I.

There Is No Substantial or Undetermined Federal Question.

In **Brown v. Board of Education**, 349 U. S. 294, this Court reaffirmed its prior holding that enforced racial segregation in the public schools violates the constitutional principles of equal protection of the laws and of due process of law. In the same opinion, it was held that full implementation of the constitutional principles requires the solution of varied local school problems; that the school authorities have the primary responsibility for solving these problems; that the school authorities must make a prompt and reasonable start toward full compliance; that once such a start has been made, additional time necessary in the public interest may be allowed, with the burden on the school authorities to establish that such time is necessary; that the function of the courts is to decide whether the action of the school authorities constitutes good faith implementation; that because of proximity to local conditions the district courts can best perform this judicial appraisal; and that in effectuating the decrees the district courts will be guided by equitable principles, with practical flexibility in shaping remedies and adjusting and reconciling public and private needs.

Cooper v. Aaron, 358 U. S. 1, unanimously reaffirmed the basic decision of the Brown case and was no departure from it. The holding of Cooper v. Aaron added the principle to those enumerated that illegal, forcible interference by a state with a court approved plan of gradual desegregation is no justification for suspension of the plan.

In the case at Bar, the legal principles above stated have been expressly recognized and carefully applied by the

District Court (R. 46a, reported at 2 Race Rel. Law R. 21, and R. 236a, reported at 3 Race Rel. Law R. 652) and by the Court of Appeals for the Sixth Circuit (Appendix to Petition).

The Three Judge District Court which originally heard the Nashville segregation case held that the School Board was acting in good faith and with appropriate dispatch to arrive at a workable plan to solve its problems (R. 47a, reported at 139 F. Supp. 378). Later the single District Judge who tried the case on the merits held that the problems confronting the School Board were substantial and numerous and that it was acting in good faith to solve them (R. 46a, reported at 2 Race Rel. Law R. 21; R. 73a, reported at 2 Race Rel. Law R. 970; R. 94a, reported at 159 F. Supp. 272; Statement from the Bench, September 16, 1957, reported at 2 Race Rel. Law R. 980).

After one continuance requested and granted by the Three Judge Court, the case was set for trial. Prior to its hearing, the School Board adopted a plan desegregating the first grade. The District Court held that this constituted a prompt and reasonable first step (R. 64a).

Subsequently the Nashville School Board showed its good faith and determination when disorders by outside agitators were effectively halted by vigorous action of the local police and by a Federal injunction sought and obtained by the School Board and the City of Nashville (R. 60b and 63b). It is a fact of historic interest that the disorders in Nashville were contemporaneous with those in Little Rock, to-wit, in the first half of September, 1957, and that the Nashville School Board had obtained a temporary restraining order and subsequently a preliminary injunction prior to the time when the Governor of Arkansas was enjoined from interfering with the orders of the Federal Court and prior to the action of the Presi-

dent in sending Federal troops to Little Rock (R. 60b and 63b; **Cooper v. Aaron**, 358 U. S. 1).

The school authorities of Nashville recognized their primary responsibility and formulated a plan. The District Court, after receiving oral testimony at two hearings, approved the plan as constituting good faith implementation; and held the school authorities had carried the burden of showing that additional time was needed. (R. 46a, reported at 2 Race Rel. Law R. 21 and R. 236a, reported at 3 Race Rel. Law R. 652). The District Court found that the school authorities had supported their action "by the clear preponderance of the evidence" (R. 238a-239a). The Court recognized that it was not deciding new principles but applying those announced by this Court in the Brown case, that it was not passing on the adequacy of a plan in other cities or areas "where different conditions obtain" and that local conditions call for the application of a local remedy (R. 239a).

The Court of Appeals for the Sixth Circuit, like the District Court, considered all the principles announced by this Court in cases involving desegregation and applied them to the facts of this case (Appendix to Petition, 37). The Court of Appeals recognized that cases involving desegregation, like other cases, depend largely on the facts, and it carefully stated and considered the facts. The Court then said:

> "The findings of the district court were sustained by the evidence. There is no claim that the Board of Education did not act in good faith. The plan is supported by practically all of the teachers in the schools. The reasons for the support of the plan were clearly given by the Superintendent of Schools, the former Superintendent of Schools, by the Acting Chairman of the Board of Education, and by one of the most experienced principals and teachers where the desegre-

gation plan was operating. Among those reasons, including difficulties arising from the recruitment of teachers, was the most persuasive one—that children in the first grade had no sense of discrimination; that as the classes of Negro and white children progressed year by year up through high school, they would know no feelings of racial discrimination, until the entire school system had been harmoniously integrated. One may disagree with the gradual process, but we cannot say that such a plan is so unreasonable that the judgment of the district court approving the plan, in the light of the evidence before it, should be reversed as clearly erroneous.

Also, it is to be said that this year, the first three grades of all public schools in Nashville will have been desegregated, leaving, at most a nine-year period thereafter for complete integration. Moreover, it may be, as said in Aaron v. Cooper, 243 F. (2d) 361 (C.A. 8), that in the light of future events, the proposed program of integration extends over too long a period and that a complete integration of all grades could be effected in a shorter space of time than now contemplated by the Board. If in the future as the program continues, it could be shown that more time was being taken than necessary, the district court would have the power to see that the plan was accelerated. It is for that reason, principally, that jurisdiction is retained by the district court to insure a full opportunity for a further showing, in the event that compliance with the Supreme Court mandate for desegregation at the earliest practicable date ceases to be the objective of those in positions of authority.

We cannot say that the district court's conclusions, in the instant case, were entirely erroneous, and, for that reason, should be set aside; nor can we say that the gradual program of integration beginning in

> the first grade, and ultimately encompassing all grades, is clearly an unreasonable one. Even were we inclined to differ with the program, and even though we felt that it was too gradual in its application, we could not say that the judgment approving the plan was clearly erroneous, and that the plan, in this regard, was not reasonable" (Appendix to Petition, pp. 72-73).

When the Petition is analyzed, it will be seen that its real grievance is not that the District Court or the Court of Appeals violated the principles heretofore announced by this Court, but that this Court has announced such principles. Implicit in the Petition is the contention this Court ought to abandon or overrule its holding that district courts because of proximity to local conditions can best apply the flexible, equitable remedies and adjust public and private needs. The Petition really asks that this Court either lay down some new law to give guidance to the lower courts, as pages 15 and 34-35 thereof indicate, or assume the function of appraising the facts in every individual case to see if the district court and the court of appeals have erred in the application of the principles to the facts, as page 26 of the Petition intimates. In a separate portion of this Argument hereafter, we separately discuss the proposition that the transfer feature of the Nashville plan presents no substantial Federal question.

Thus, there is no important Federal question raised by the Petition unless it be the request that this Court should retract and depart from its holding in **Brown v. Board of Education**, 349 U. S. 294. We respectfully submit this does not raise a substantial or undetermined Federal question and the Petition should be denied.

II.

There Is No Conflict of Decisions.

Including the decision of the Court of Appeals for the Sixth Circuit in the present case, there have been three cases in different circuits where a court of appeals has reviewed a challenged plan for gradual desegregation. In every case there was affirmance of the judgment of a district court approving the gradual plan. The decisions, other than the case at Bar, were **Aaron v. Cooper**, 243 F. (2d) 361 (8 Cir. 1957), affirming the decision of the district court in the same styled case, reported 143 F. Supp. 855, and **Slade v. Board of Education of Harford County**, 252 F. (2d) 291 (4 Cir. 1958), cert. denied 357 U. S. 906, affirming the decision of the district court in the case of **Moore v. Board of Education of Harford County**, 152 F. Supp. 114.

In **Aaron v. Cooper** (1957), 243 F. (2d) 361, the Eighth Circuit affirmed a decision approving an eight year plan for desegregating the grade schools of Little Rock, Arkansas, and said:

> "Appellants cite to us several cases where Federal Courts have used their injunctive powers to speed up or effectuate integration . . . . These decisions serve only to demonstrate that local school problems are 'varied' as referred to by the Supreme Court. A reasonable amount of time to effect complete integration in the schools of Little Rock, Arkansas may be unreasonable in St. Louis, Missouri, or Washington, D. C. The schools of Little Rock have been on a completely segregated basis since their creation in 1870. That fact, plus local problems as to facilities, teacher personnel, the creation of teachable groups, the establishment of the proper curriculum in desegregated schools and at the same time the maintenance of standards of quality in an educational program may make the situa-

tion at Little Rock, Arkansas, a problem that is entirely different from that in many other places. It was on the basis of such 'varied' school problems that the Supreme Court in the second Brown decision remanded the cases there involved to the local District Courts to determine whether the school authorities, who possessed the primary responsibility, have acted in good faith, made a prompt and reasonable start, and whether or not additional time was necessary to accomplish complete desegregation. The question of speed was to be decided with reference to existing local conditions . . ." [243 F. (2d) 363-364].

In **Slade v. Board of Education of Harford County** (Fourth Circuit, 1958), 252 F. (2d) 291, the Court unanimously affirmed the decision of the trial Judge approving a seven year plan for desegregating grade schools in Harford County, Maryland. Under this gradual plan elementary schools were to be desegregated over a two year period and high schools were to be desegregated over a five year period. The Circuit Court said:

> "The facts are fully set forth in the opinion of the District Judge and we think that his discretion was properly exercised for reasons adequately stated in the opinion, to which nothing need be added."

In the opinion of the District Court, 152 F. Supp. 114, it was said:

> "The Harford County Board had sound reasons for making the transition on a year to year basis, so that most Negro children will have a normal high school experience, entering in the seventh grade and continuing through the same school.
>
> . . .
>
> This plan is different from any to which my attention has been called or about which I have read. It is an equitable way of handling the transition period."

The Petition, p. 35, asserts that prior decisions indicated a 12-year plan was not compliance with the law. There is no indication that the local school problems in those cases brought to the attention of the district court were substantially the same as, or comparable to, the problems existing in the City of Nashville. Aside from this, a decision of a district court in the Fourth Circuit **(Pierce v. Cabel County)** and of a district court in the Sixth Circuit **(Mitchell v. Pollack)**, not appealed from, do not constitute a conflict of decisions because they are, or may be, at variance with subsequent decisions of the Court of Appeals for their respective circuits.

III.

The Transfer Provisions of the Plan Are Valid.

The transfer provisions of the plan submitted by the School Board and approved by the courts below do not provide for nor contemplate any involuntary transfers of students. The plan provides that school zones or districts based upon location of school buildings and the latest scholastic census without reference to race will be established. The plan then declares the right of every student to attend the school designated for the zone in which he resides "subject to regulations that may be necessary in particular instances". At the hearing it was explained that the quoted qualification was made to take care of situations which would arise if an emergency, such as a fire-damaged school or one with pupil registration beyond its capacity, necessitated sending children temporarily to schools outside their zone.

Under the plan, transfer may be requested by a parent or person in *loco parentis* for the student, and only those children on whose behalf transfers are requested will regularly attend schools outside of their zone. Each stu-

dent has the right to attend the school of his zone, whether he be the only student of his race in that zone, whether it be a school previously used exclusively for students of a different race, or whatever the circumstances.

This right to attend the school of the zone in which the student lives is one that remains so long as residence in that zone also continues. One does not lose the right because he elects to transfer out for a particular school year.

If application for transfer is made and approved at the beginning of a school year, it is effective only for that school year and is not a permanently binding election. At the beginning of the next school year, the student, as of right and despite his prior voluntary transfer, may go to the school of his zone; or his parents may voluntarily seek another transfer for him.

The schools of Nashville operate on a school year basis, as distinguished from a semester basis or a term basis. This means that pupils are promoted only once a year, in the Spring when school closes (R. 25b). This fact explains why the school board does not, as of right, permit transfers after the school year begins, nor permit re-transfers. The election to transfer or not to transfer, once made, is binding for that school year.

The plan recognizes as valid conditions to support application for transfer (a) that a student would otherwise be required to attend a school previously serving only the other race, or (b) that a student would otherwise be required to attend a school where the majority of students in that school or in his grade are of a different race.

In Nashville in 1957, because of the composition of particular neighborhoods amounting to voluntary residential segregation, only 115 of the 1400 Negro students in the first grade were eligible under a zoning system to attend

schools previously attended only by white students; and only 55 of the 2,000 white students in the first grade were eligible to attend schools previously attended only by Negro students. As a practical matter, those eligible because of residence in a zone to attend its school are either very predominantly white or Negro.

The members of the School Board, with their intimate knowledge of local conditions and local sentiment, accurately foresaw that transfers would be preferred by nearly all of the small minority, white or Negro, who would otherwise be forced to attend school where the opposite race was strongly predominant. The School Board, complying in good faith with the constitutional mandate, also recognized that desegregation is not popular with a majority of the people of Nashville. The School Board, therefore, in its plan to abolish compulsory segregation included transfer provisions designed to reassure the troubled and affected parents that there would be no compulsory integration. Thereby it sought not to disrupt the educational program of the city, that is, it endeavored to "take into account the public interest in the elimination of such obstacles in a systematic and effective manner". (**Brown v. Board of Education**, 349 U. S. 294 at 305.)

The transfer provisions have application only when the parent of the student primarily affected invokes them. We, therefore, submit there is no constitutional problem under the equal protection of the laws clause.

As illustrative, let us consider the Negro pupils eligible by reason of their residential zone to attend a previously all white school. Most of them voluntarily elected to seek a transfer to a previously all Negro school. The constitutional rights of these transferees were not violated by the transfer provisions. They might have stayed in the school for their zone, but they elected to go elsewhere. Some of

these students, approximately ten percent of those eligible to attend previously all white schools, did not apply for transfers, and so they attended the school for their zone.

An argument predicated upon the unconstitutionality of the voluntary transfer provisions of the plan assumes that one student has a constitutional right that another student be compelled to attend school in his geographic zone. The argument further assumes that compulsory integration is required by the Fourteenth Amendment. This contention was effectively answered by the district court (R. 53a-54a) and by the Court of Appeals, as follows:

> "We come, then, to the transfer provision of the plan, allowing the voluntary transfer of white and Negro students, who would otherwise be required to attend schools previously serving only members of the other race; and allowing the voluntary transfer of any student from a school where the majority of the students are of a different race. This provision does not fall within the ban of the maintenance of segregated public schools by cities where permitted—though not required—by statute, such as was condemned by the Supreme Court in **Brown v. Board of Education**, 347 U. S. 483. The district court, in the instant case, considered that, in accordance with the reasoning in **Briggs v. Elliott**, 132 F. Supp. 776 (D. C. S. C.), the transfer provisions did not violate the equal protection clause of the Fourteenth Amendment. . . . Appellants say that the transfer plan is only a scheme to evade the decisions of the Supreme Court. . . . There is no evidence before us that the transfer plan is an evasive scheme for segregation. If the child is free to attend an integrated school, and his parents voluntarily choose a school where only one race attends, he is not being deprived of his constitutional rights. It is conceivable that the parent may have made the

choice from a variety of reasons—concern that his child might otherwise not be treated in a kindly way; personal fear of some kind of economic reprisal; or a feeling that the child's life will be more harmonious with members of his own race. In common justice, the choice should be a free choice, uninfluenced by fear of injury, physical or economic, or by anxieties on the part of a child or his parents. The choice, provided in the plan of the Board, is, in law, a free and voluntary choice. It is the denial of the right to attend a non-segregated school that violates the child's constitutional rights." (Appendix to Petition, pp. 73-75.)

IV.

Community Attitude to Desegregation.

The Petition, p. 21, by distortion of the record in this case, implies that "testimony of violence and hostility was admitted into evidence" to justify a gradual plan. Such is an erroneous and unfair presentation of the record and the Petition cannot and does not quote from any finding of fact or conclusion of law by the District Court to justify its contention, nor does it cite any testimony erroneously admitted either over objection or without objection.

At the first hearing with respect to a plan prior to any desegregation, and hence prior to any act of violence, the School Board offered testimony regarding its problems and why it needed to plan carefully and proceed gradually (R. 19b, et seq.). Later, the first grade was desegregated and there came public displays of disorder and violence. The School Board secured the vigorous cooperation of the local police to suppress the unlawful actions and on its own initiative sought and obtained a temporary restraining order and subsequently a prelimi-

nary injunction against the known violators (R. 60b and 63b).

Months later there came a final hearing by the District Court on the grade by grade plan (R. 105a, et seq.). Witnesses for the School Board unanimously and strongly supported the grade by grade plan. As found by the District Court:

> ". . . these witnesses, based upon their years of experience in education and upon their intimate knowledge of conditions in Nashville, sincerely believe that a sudden or abrupt transition to a desegregated basis would engender administrative problems of such complexity and magnitude as to seriously undermine and impair the educational system of the city (R. 237a). . . . They support the School Board's plan primarily because they feel that it offers the best opportunity to bring about full desegregation harmoniously and without serious disruption of the educational program of the city" (R. 238a).

For the record in the Court of Appeals plaintiffs did not consider the evidence offered at the collateral hearing for an injunction sufficiently significant to have any part of it printed in the Appendix, nor did the School Board; and hence this evidence is not in the record before this Court. On page 16 of their brief in the Court of Appeals, plaintiffs charged that the School Board "had sought delay in every stage of this litigation and had put forward schemes designed solely to evade compliance with desegregation". To refute the baseless charge that this School Board acted in bad faith, we referred, among other evidence, to the statement by the District Court at the hearing on injunction to the effect that the School Board had acted in good faith from the beginning and except for the firm action of local authorities the reign

of terror in Nashville would have been much worse than it was (2 Race Rel. Law R., 980-981).

The opinion of the Court of Appeals may not fairly be interpreted as justifying delay by community hostility, but rather as giving the background against which a school board devised and carried through without interruption its plan for desegregation. To the extent the Petition implies that members of a school board must close their eyes to public sentiment, we deny the implication finds support in **Cooper v. Aaron**, 358 U. S. 1, or elsewhere. If public attitudes are irrelevant to the question of how much time is necessary to an orderly transition to desegregation, then the difficulty of a problem has no connection with the time to be allowed for its solution. It is an obvious truth that whatever impairs or may adversely affect the educational system is the proper concern of the School Board. Such truth has application here. It is equally obvious that law and order cannot surrender to violence or the threat of violence. This principle has no application here and is brought forward in an attempt to divert attention from the realities.

V.

Rights of Individual Plaintiffs.

Attacking the gradual (grade by grade) plan, the Petition, pp. 17-20, asserts that such plan denies the named petitioners (children) the right ever to attend "a desegregated class in the public schools". The Petition does not and could not assert that the plan denies these children the right to attend a desegregated school system or even a desegregated school.

To the extent the individual plaintiffs are used as illustrative of a class—that is, those who will graduate before their grade is desegregated, the Petition makes a complaint

which can be directed against any gradual plan or any period of transition. When this Court recognized the possibility of a period of transition, it inferentially authorized some segregation along with desegregation during the period of transition and when the evidence justified it. Because some pupils finish grade schools every year, the objection now made can be made with respect to every gradual plan, whether a three step plan, a seven year plan, an eight year plan, or a grade by grade plan.

To the extent the Petition claims for the individual plaintiffs greater rights than those claimed for other students in the same grade, i. e., if the Petition urges that an exception in their individual favor should have been made, the short and decisive answer is: Petitioners did not request nor even suggest this exception by pleading, testimony, brief, oral argument or otherwise in the District Court. At the final hearing with respect to the plan on its merits, plaintiffs did not offer evidence as to their then status in the grade schools and did not request the District Court to give them exceptional status. [Cf. **Board of Education of St. Mary's County v. Groves**, 261 F. (2d) 527.] For ought that appears in the present record, every individual petitioner may have graduated from grade school or moved away from Nashville or changed the zone of his residence.

VI.

Conclusion.

Because we believe the opinions below clearly show that the challenged decree was not erroneous and each of these opinions at this time constitutes an effective brief on the merits in our favor, we shall not further lengthen this reply brief to fortify our contention that the decision below is correct on the merits. However, we do not understand the

correctness of such decision is the basic question which this Court will decide at this time.

A school board acting in good faith and confronted with serious problems has adopted a plan for desegregation **and its plan is working.** The District Court, after hearing oral and conflicting testimony, approved the plan. The Court of Appeals, after carefully reviewing and summarizing the record, affirmed.

If the law heretofore declared by this Court is to stand, and if this Court is not to assume the function in each case of deciding whether a plan of desegregation adopted by the school board is the best and most suitable one, then the Petition for the Writ of Certiorari ought to be denied.

Respectfully submitted,

EDWIN F. HUNT,

REBER BOULT,
700 American Trust Building,
Nashville, Tennessee,
Counsel for Respondents.